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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1285

JOHN P. WOOD, et al.,
Petitioners,

vs.

PEGGY STRICKLAND, a Minor, by MR. and MRS. VIRGIL JUSTICE, Her Parents and Next Friends; VIRGINIA CRAIN, a Minor, by DORIS CRAIN, Her Mother and Next Friend,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

HERSCHEL H. FRIDAY
G. ROSS SMITH
1100 Boyle Building
Little Rock, Arkansas 72201
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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PEGGY STRICKLAND, a Minor, by MR. and MRS. VIRGIL JUSTICE, Her Parents and Next Friends; VIRGINIA CRAIN, a Minor, by DORIS CRAIN, Her Mother and Next Friend,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioners[1] pray that a writ of certiorari issue to review the decision by the United States Court of Appeals for the Eighth Circuit in this case.

[1] Petitioners are: John P. Wood, Ed Stevenson, Rachael Goforth, Bob Philpot, Jim Ayleshire, Raymond Stroud, Bill Plunkett, Members of the Board of Education of the Mena, Arkansas Special School District, and the Mena Special School District.

OPINIONS BELOW

The August 29, 1973 opinion of the United States Court of Appeals for the Eighth Circuit is not yet reported and is set forth as Appendix I. The opinion of three judges of the Court of Appeals dissenting from the denial of the petition for rehearing en banc is not reported and is set forth as Appendix III hereto. The decision of the United States District Court for the Western District of Arkansas, Fort Smith Division is reported at 348 F.Supp. 244 (W.D. Ark. 1972) and is set forth as Appendix V.

JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 1973. On September 27, 1973, the Court of Appeals denied a timely filed petition for rehearing, Appendix II. On December 13, 1973, petitioners timely applied to Mr. Justice Blackmun for an extension of time for filing this petition and an order was entered by Mr. Justice Blackmun on December 17, 1973 extending the time for filing of this petition to February 22, 1974. A copy of the last mentioned order is Appendix IV hereto. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254 (1).

QUESTIONS PRESENTED

1. Whether federal courts have jurisdiction to invalidate, on grounds of insufficiency of evidence, a public school board's decision to suspend a tenth grade student for possession and use of intoxicating beverages at a school function on school premises, where the student presents no claim of deprivation of fundamental constitutional rights of speech, association, religion or equality of race or sex, and where the procedures utilized in effecting the suspension have not been held unlawful?

2. Whether a public school board member is entitled to invoke the doctrine of official immunity in a student's civil rights suit under 42 U.S.C. §1983 so as to avoid individual and personal financial liability except where the acts complained of were done with malice?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

and 42 U.S.C. §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

The Complaint herein was filed by two tenth grade students (and their parents) of the Mena, Arkansas School District against certain administrators of the district, the school district itself and all members of the Board of Education, alleging jurisdiction under 28 U.S.C. §§ 1343 (3) and (4), 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. §§ 1981 and 1983 and deprivation of rights under the Fifth, Fourteenth and Ninth Amendments to the United States Constitution (A. 7-13).[2] The original Complaint sought injunctive and declaratory relief, and by amendment, monetary damages, both compensatory and punitive, were sought from the defendants in their individual capacities and from the school district itself (A. 18-20).

The action complained of was the suspension of the girls for the balance of the school semester because of a school board finding that the students had violated a rule prohibiting possession or use of intoxicating beverages at a school sponsored activity.[3] The girls admitted that they had poured a quantity of alcoholic beverage into punch served at an extracurricular

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[2] Unless otherwise noted, all citations to "A" are to the Appendix in the Court of Appeals.

[3] The relevant rules are as follows:

"3. Suspension

* * * * * * *

"b. Valid cause for suspension from school on first offense: 'Pupils found to be guilty of any of the following shall be suspended from school on the first offense for the balance of the semester and such suspension will be noted on the permanent record of the student along with reason for suspension.

* * * * * * *

"(4) The use of intoxicating beverages or possession of same or at a school sponsored activity." Court of Appeals Slip Opinion, p. 2.

school function conducted by the home economics department for parents and students. Court of Appeals Slip Opinion, p. 2.

The case was tried to a jury which failed to reach a verdict, following which the district judge declared a mistrial, granted the petitioners' motions for judgment in accordance with their previous motions for directed verdicts and denied respondents' motion for new trial. Ibid at p. 5. On appeal to the Court of Appeals for the Eighth Circuit, the judgment was reversed and remanded for a new trial on the issue of damages against the individual school board members. The Court of Appeals held that, in its view, there was no evidence before the school board that the beverage used[4] was "intoxicating" within the terms of the rule and that the students had therefore been deprived of substantive due process. The Court also held that the students were entitled to recover damages from school board members in their individual capacities without a showing of malice and upon a showing that the petitioners did not, in light of all the circumstances, act in good faith, objectively determined.

Rehearing was denied, with three judges of the Court of Appeals dissenting in an opinion which contended that the respondents had failed to show deprivation of a federally protected right and that ". . . the substantive reach of the due process clause on the public school campus is limited to the protection of specifically identifiable federal constitutional rights." Slip opinion, p. 2.

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[4] A malt liquor beverage called "Right Time." Court of Appeals Slip opinion, p. 2, and note 2, p. 4.

REASONS FOR GRANTING THE WRIT

This case involves important issues as to the jurisdiction of federal courts to intervene in the day-to-day operations of the public school systems of this country. At issue is the extent to which a public school student has a federally protected right to challenge a school board decision to suspend him from school where the grounds for the suspension do not involve deprivation of any specific constitutional right and the challenge to the suspension rests merely on an alleged lack of substantial evidence supporting the decision. Also involved is the nature and extent of the remedy provided by 42 U.S.C. § 1983 to a student, assuming he has been deprived of a federal right, against members of boards of education of public school districts in their **individual** capacities.

In its decision below, the panel of the Court of Appeals for the Eighth Circuit held that it had jurisdiction to invalidate as violative of substantive due process the Mena Board of Education's decision to suspend two female tenth grade students after having found them to have violated a rule prohibiting possession and use of intoxicating liquors at school functions. The Court of Appeals premised its finding of a constitutional violation on the alleged lack of proof that the alcoholic beverages admittedly used by the students were in fact "intoxicating." Reasoning that no violation of the rule had thus been established, the Court of Appeals equated that with a violation of substantive due process and held the suspensions invalid. The petitioners herein filed a petition for rehearing by the Court of Appeals en banc and were joined in such petition by the Arkansas School Board Association as amicus curiae. Rehearing was denied, three judges dissenting.

Questions relating to the propriety of federal court intervention in matters of public school administration are not new, and the basic principles of intervention are settled. Although

"[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," **Shelton v. Tucker,** 364 U.S. 479, 487 (1960), nevertheless this Court has ". . . repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." **Tinker v. Des Moines Community School District,** 393 U.S. 503, 507 (1969). And in **Epperson v. Arkansas,** 393 U.S. 97 (1968), this Court stated:

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems **and which do not directly and sharply implicate basic constitutional values."** (Emphasis supplied.)

The holding of the Court of Appeals in this case is a drastic departure from those settled principles and will vastly increase the frequency and extent of judicial interposition in public school matters. Petitioners contend that there is nothing in this case which ". . . sharply implicates basic constitutional values," *Ibid,* and that the students herein have not established deprivation of a federal right. Three judges of the Court of Appeals agreed in an opinion by Chief Judge Mehaffy dissenting from the denial of rehearing, who observed:

> "This is not a case where the school board has invaded federally protected areas of speech, association, religion, or equality of race or sex. Nor is this a case where the procedure accorded the students was inadequate, unreasonable, or unfair. Instead, as the panel itself concludes,

this is a case where the school board has established a reasonable rule, the students had notice of the rule, the students by their own admission had violated the rule, and, after full procedural protection was afforded, the rule was enforced. Under such circumstances I fail to perceive any federal constitutional question in appellant's attack." Slip Opinion, p. 2.

Of course, federal courts have jurisdiction to protect students and teachers whose rights of speech, association, religion or equality of race or sex have been infringed by school administrators or board members. See, e.g., **Tinker,** *supra*; **Pickering v. Board of Education,** 391 U.S. 563 (1968); **Swann v. Charlotte-Mecklenburg Board of Education,** 402 U.S. 1 (1971). However, in the absence of deprivation of such specific fundamental federal rights, a teacher or student's challenge presents no federal question. See e.g., **Freeman v. Gould Special School District,** 405 F.2d 1153 (8th Cir. 1969), cert. denied 396 U.S. 843; **Murray v. West Baton Rouge Parish School Board,** 472 F.2d 438, 444 (5th Cir. 1973). And it is equally clear that education itself is not a federally protected right. See **San Antonio School District v. Rodriquez,** — U.S. —, 36 L.Ed.2d 16 at pages 44-46, where the majority opinion of this Court states in connection with its discussion as to the proper standards by which to judge the constitutionality of school finance systems, as follows:

> "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation."
>
> * * * * * * *
>
> "We have carefully considered each of the arguments supportive of the District Court's finding that education is a

> fundamental right or liberty and have found those arguments unpersuasive. In one further respect we find this a particularly inappropriate case in which to subject state action to strict judicial scrutiny. The present case, in another basis sense, is significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases involved legislation which 'deprived,' 'infringed,' or 'interfered' with the free exercise of some **fundamental personal right or liberty**." (Emphasis supplied.)

Thus the finding herein of a violation of federal "substantive due process" rests on nothing more than the Court of Appeals' conclusion that the suspension decision was "wrong," or unsupported by substantial evidence.

But, even assuming a student or teacher is the subject of an erroneous decision **not** involving basic constitutional rights, grievances arising out of merely erroneous decisions by state and local officials do not rise to constitutional proportions. This Court, the Court of Appeals for other circuits, and the Eighth Circuit itself have so held. **Snowden v. Hughes,** 321 U.S. 1 (1943)[5]; **Gryger v. Burke,** 334 U.S. 728 (1948);[6] **Larson v. Domestic & Foreign Commerce Corp.,** 337 U.S. 682 (1949);[7]

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[5] "(A) construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored." **Snowden v. Hughes,** 321 U.S. at 11.

[6] "We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question." **Gryger v. Burke,** 334 U.S. 728, 731.

[7] "It is argued that an officer given the power to make decisions is only given the power to make correct decisions. * * * We have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so." **Larson v. Domestic & Foreign Commerce Corp.,** 337 U.S. 682, 695 (1949).

Murray v. West Baton Rouge Parish School Board, 472 F.2d 438, 444 (5th Cir. 1973); **Shock v. Tester,** 405 F.2d 852 (8th Cir. 1969) cert. denied 394 U.S. 1020; **Scheelhaase v. Woodbury Central Community School Dist.,** — F.2d — (8th Cir., No. 73-1067, Nov. 28, 1973). The matter is precisely stated (in the public school context) in **Murray,** *supra* at p. 444:

> "In order to avoid any misinterpretation and even at the risk of redundancy, we conclude by emphasizing that the Constitution is not fenced out of the school grounds, but that every barb felt by students or parents in the school fence is not constitutionally offensive. Although we shall not hesitate to use our constitutional clippers where appropriate, we cannot forget that a public school principal retains considerable freedom to administer his realm. For better or for worse, our jurisdiction attaches only when the Constitution has been violated—not every time a principal acts arbitrarily or unfairly. In affirming the dismissal of this claim we are in no way passing on the propriety or wisdom of the disciplinary and testing practices of West Baton Rouge Parish. We merely held that on the facts of this case, plaintiffs have totally failed to prove a deprivation of any constitutional right."

And in **Scheelhaase,** *supra*, it was said:

> "In the performance of its duties the Board (of Education) is empowered to act in accordance with its best discretion. It is possible that the discretion of a Board may, at times, to those more generously endowed, seem to have been exercised with a lack of wisdom. But the Board's decisions in the exercise of its discretion are not vulnerable to our correction merely if they are 'wrong,' sustainable only if they are 'right.' " Slip Opinion, p. 8.

The implications of the Court of Appeals holding are clear. As noted by the Chief Judge in dissenting from the denial of rehearing:

"I am, of course, aware that 'substantive due process' has in the past been used without regard to any specific constitutional safeguard to attack a wide variety of state action. E.g. **Lochner v. New York,** 198 U.S. 45 (1905); **Coppage v. Kansas,** 236 U.S. 1 (1915). But I thought the federal judiciary had long since rejected such a free-wheeling use of 'substantive due process' because it inevitably had led to an unwarranted invasion of the duties and responsibilities of state and local governments. E.g. **Ferguson v. Skrupa,** 372 U.S. 726 (1963). None of the cases cited by the panel supports such an unfettered reading of the due process clause; instead, all of the cases involved attacks either on the procedure accorded or on an alleged invasion of some specifically protected right such as free speech. **I fear that the panel's opinion now places every federal court, at least in this circuit, in the position of serving as a board of appeal for every disciplined public school student who feels that his punishment was too severe or that the school board's decision was not supported by substantial evidence.** I feel that this function is one that is the sole responsibility of the state and local governments, which in this case have long provided an appropriate judicial remedy. E.g. **Douglas v. Campbell,** 89 Ark. 254, 116 S.W. 211 (1909)." Slip Opinion, pp. 2-3. (Emphasis supplied.)

This Court is familiar with the virtual "explosion" of litigation initiated by disgruntled, non-tenured school teachers seeking to challenge decisions not to renew their teaching contracts even though no cognizable federal claim was involved. And in **Board of Regents v. Roth,** 408 U.S. 564 (1972) and **Perry v. Sinderman,** 408 U.S. 593 (1972) this Court acted to resolve that controversy so as to make clear that, absent deprivation of a federal right of liberty or property, such decisions are a matter of local concern properly within the discretion of school authorities. Petitioners submit that the considerations involved in

student disciplinary matters have now reached comparable proportion and warrant grant of this petition to resolve the question. The need for resolution is greater in the student context, for public school authorities cannot long maintain discipline and a proper atmosphere for learning with the ever present threat of the necessity for abandoning their educational responsibilities to appear in federal court at the behest of a disgruntled student or parent and attempt to convince a federal judge of the correctness of suspension decisions. Nor should federal judges lacking in educational expertise be continuously called upon to intrude into the day-to-day operation of the public schools.

Coincident with its substantive due process holding expanding the scope of federal jurisdiction in student disciplinary matters, the Court of Appeals also has increased the exposure of public school board members to liability for monetary damages in suits by students alleging deprivation of civil rights. The panel held that a public school board member is individually liable for financial damages if, in a student's civil rights action under 42 U.S.C. §1983, it is established that the board member "did not, in the light of all the circumstances," act in good faith, objectively determined. Slip opinion, p. 9. Although the opinion does not elaborate on the exact substance of that standard of conduct, one of the authorities cited by the panel suggests that it means "being right." **Weddle, Damages Under §1983: The School Context,** 46 Ind. L.J. 521 at 530, note 56 (1970-71).

Although this Court has frequently considered the doctrine of public official's immunity from financial damages,[8] it has not done so in the context of public school officials. As a result, the various decisions considering the extent to which a school board member is immune from individual financial liability for

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[8] See e.g. **Bradley v. Tisher,** 84 U.S. 335; **Barr v. Matteo,** 360 U.S. 564 (1959); **Pierson v. Ray,** 385 U.S. 547 (1967); **Doe v. McMillan,** 412 U.S. 306 (1973).

his actions are in pronounced conflict. Compare the opinion of the panel below with **McLaughlin v. Tilendis,** 398 F.2d 287 (7th Cir. 1968) (apparently recognizing a form of absolute privilege conditioned on an adequate justification for the action taken) and **Smith v. Losee,** 485 F.2d 334 (10th Cir. 1973) (privilege conditioned on "affirmative showing that the decision [challenged] . . . was . . . an exercise of . . . discretion vested in it by state law, made in good faith and without malice, when the official facts . . . showed a good and valid reason for the decision although another reason . . . advanced . . . may have been constitutionally impermissible.")

The three separate opinions in **Smith v. Losee,** *supra* (a teacher dismissal case) accurately portray the nature of the conflicting approaches of the various circuits and the need for clarification. Judge Barrett, partially dissenting and partially concurring, states that the proper standard to determine individual liability under §1983 is malice and that absent malicious acts, school authorities should not be liable. 485 F 2d at 346. Conceding that the Court was venturing "into a previously uncharted sea," *ibid,* Judge Barrett decries the majority opinion's lack of precision:

> "The practical effect of leaving the standard of privilege undefined insofar as it relates to those administrators charged by law to exercise discretion in the subject areas to inform and advise the Board is that henceforth I am fearful that such persons shall no longer serve the intended public interest. **At the risk of personal money judgments, they shall not recommend against tenure or non-renewal regardless of their good faith belief that certain persons should not be retained on the faculty.** I simply cannot be a party to such a result." 485 F.2d at 347. (Emphasis supplied.)

Noting that the prospect of school officials having to pay judgments from their personal assets was "frightening," 485 F.2d at 349,

> "The risk of personal judgments in the exercise of discretion relative to contract tenure and renewal confronting persons serving in administrative positions such as appellants Losee, Barnum and Peterson will almost certainly guarantee one result: Henceforth those in like positions shall not recommend against tenure or contract non-renewal regardless of their good faith beliefs otherwise. They simply cannot afford to be wrong when error hits their pocketbooks personally. Such a result does not speak well for the future of our system." 485 F.2d at 350.

In his dissent in **Smith,** Judge Doyle agrees that the majority's failure to adequately resolve the issue is "unfortunate" and bound to lead to diverse results in the trial courts.

The federal district court decisions reflect a similar conflict. Some appear to recognize an absolute immunity (see **Derby v. University of Wisconsin,** 325 F.Supp. 163 (E.D.Wis. 1971); **Lessard v. Von Dale,** 318 F.Supp. 74 (E.D.Wis. 1970); and **Abel v. Gousha,** 313 F.Supp. 1030 (E.D.Wis. 1970), while others impose qualifications on the immunity (see **Gouge v. Joint School District No. 1,** 310 F.Supp. 984 (W.D.Wis. 1970), and **Schreiber v. Joint School District,** 335 F.Supp. 74 (E.D. Wis. 1972).

It is clear that common law immunities are available as a defense in actions under § 1983. **Pierson v. Ray,** 386 U.S. 547 (1967). Likewise, the reasons supporting the immunity defense are well-established. In **Gregoire v. Biddle,** 177 F.2d 579 (2nd Cir. 1949), Judge Learned Hand made the following observations:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others or for any other personal motive not connected with the public good, should not escape liability for the injuries . . . he may so cause; and, if it were possible in practice

> to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials . . . to the burden of a trial and to the inevitable danger of its outcome, would damper the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith."

See also **Bauers v. Heisel,** 361 F.2d 581 (3rd Cir. 1966), listing the arguments in favor of immunity, as *inter alia,* the danger of influencing public officials by threat of a lawsuit, the deterrent effect of potential liability on men who are considering entering public life, the drain on the valuable time of the official caused by insubstantial suits, the feeling that the ballot and formal removal proceedings are more appropriate ways to enforce honesty and efficiency of public officers.

Petitioners submit that official immunity considerations are nowhere more important than in suits by public school students against school administrators and board members, particularly since the latter serve from wholly altruistic motives without remuneration other than public recognition and appreciation for a job well done. The writ should be granted to permit this Court to authoritatively resolve the current conflicting views and to articulate definitive guidelines for uniform disposition of suits against school authorities.

CONCLUSION

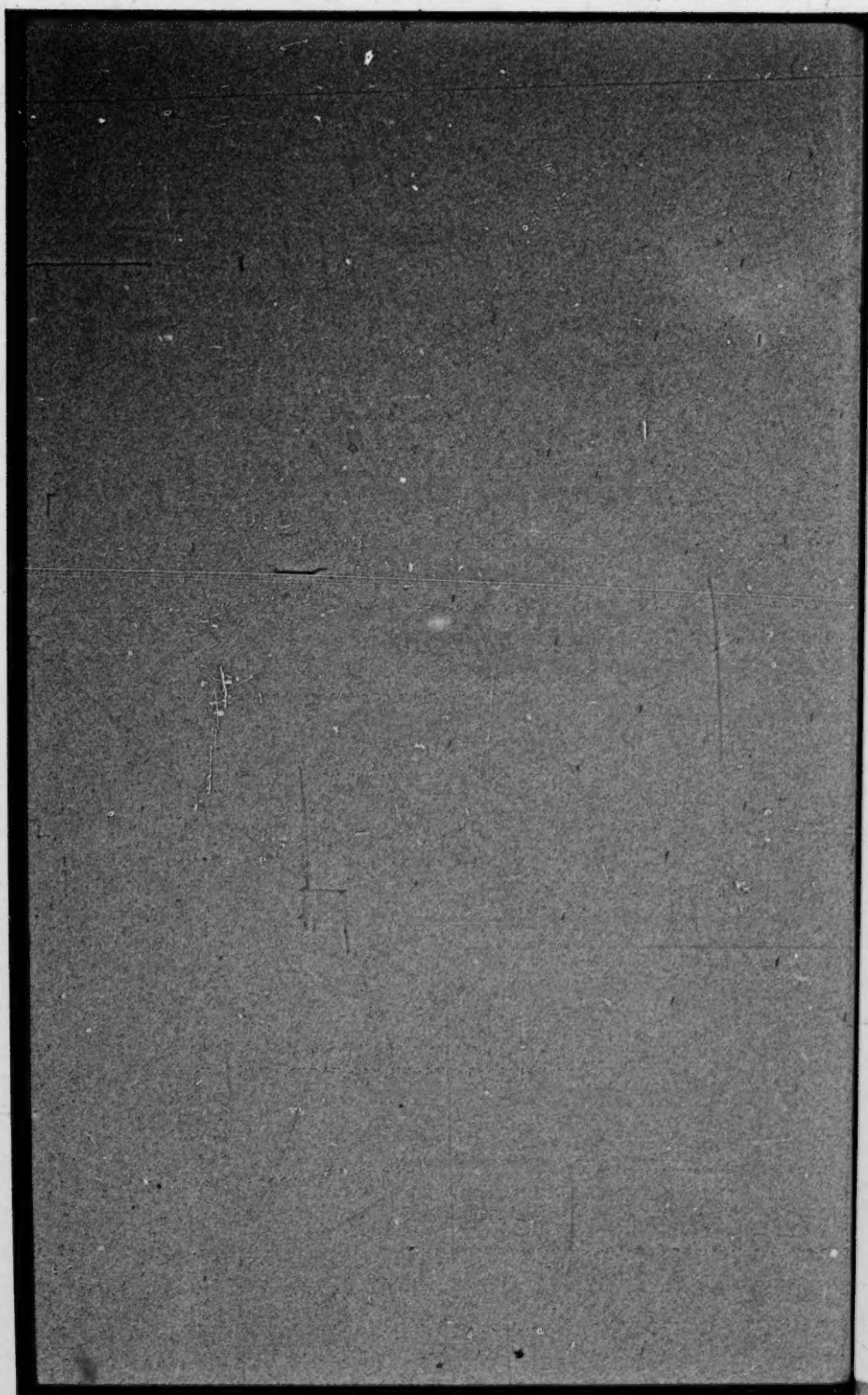
For the foregoing reasons it is submitted that a writ of certiorari should issue to review the August 29, 1973, decision by the Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted

HERSCHEL H. FRIDAY

G. ROSS SMITH
1100 Boyle Building
Little Rock, Arkansas 72201
Attorneys for Petitioners

APPENDIX



APPENDIX I

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 72-1774

Peggy Strickland, a Minor, by Mr. and Mrs. Virgil Justice, Her Parents and Next Friends; Virginia Crain, a Minor, by Doris Crain, Her Mother and Next Friend,

Appellants,

v.

S. L. Inlow, Duddy Waller, John P. Wood, Ed Stevenson, Rachael Goforth, Bob Philpot, Jim Ayleshire, Raymond Stroud, Bill Plunkett and Mena Special School District,

Appellees.

Appeal from the United States District Court for the Western District of Arkansas.

Submitted: May 15, 1973.

Filed: August 29, 1973.

Before GIBSON, HEANEY and ROSS, Circuit Judges.

HEANEY, Circuit Judge.

We are concerned on this appeal with the propriety of District Court action denying relief to two high school students who

were given lengthy suspensions from school for allegedly violating school regulations with respect to the possession and use of intoxicating liquors at a school function on school premises.

Peggy Strickland, Virginia Crain and Jo Wall were tenth grade students at Mena High School, Mena, Arkansas, when this controversy arose. On February 18, 1972, the three girls were accompanied to the principal's office by Mrs. Curtis Powell, a home economics teacher, where they volunteered to Mr. Waller that they had "spiked" the punch at a recent extracurricular home economics class function. They related to him, through Mrs. Powell, that on the day of the spiking incident, someone (it is not clear who) suggested that the punch be spiked. The three girls obtained permission to leave the campus and traveled to a tavern in Oklahoma where Jo Wall purchased two 12-ounce bottles of a flavored malt beverage, "Right Time." The three students then purchased six 10-ounce containers of a soft drink and combined the total eighty-four ounces of liquid in a milk carton, and returned with the mixture to school. To the liquid was then added enough water to total one and one-half gallons of punch, which was served at the gathering.

A disciplinary regulation of the Mena Special School District provides:

> "3. Suspension
>
> * * * * * * * *
>
> "b. Valid cause for suspension from school on first offense: "Pupils found to be guilty of any of the following shall be suspended from school on the first offense for the balance of the semester and such suspension will be noted on the permanent record of the student along with reason for suspension.
>
> * * * * * * * *
>
> "(4) The use of intoxicating beverages or possession of same or at a school sponsored activity."

Pursuant to this regulation, Principal Waller suspended the three girls from classes and extracurricular activity for one week, and told them that ultimate disposition would be in the hands of the School Board. He added, however, that he and Mrs. Powell would intercede for them and ask for leniency.

Without adequate notice to the students and with no notice to their parents, a special meeting of the School Board was held the night of February 18 to consider the matter. The only people in attendance were the members of the Board, Mr. Inlow, Mr. Waller and Mrs. Powell. Mrs. Powell relayed the girls' statements to the Board and she, along with Mr. Waller, recommended leniency. Shortly after these recommendations were made, a telephone call was received by Mr. Inlow. The caller was Mrs. Powell's husband, also a teacher at the school. He informed Mr. Inlow that he (Powell) had been told that Jo Wall had been involved in an altercation with another student after a basketball game that evening. Mr. Inlow then informed the Board of the substance of his conversation with Powell, leaving out the name of the student involved. With this, Mrs. Powell and Principal Waller withdrew their recommendations and "washed their hands" of the matter. The Board voted to suspend all three students for the balance of the semester.[1]

The School Board considered the matter for a second time on March 2, 1972. Present at this meeting were the members of the Board, Mr. Inlow, the appellants, their parents and counsel for the appellants and appellees. Neither Mr. Waller nor Mrs. Powell, the only two who had testified at the February 18 meeting, was present, although they were in their respective offices in the building during this time. The Board presented a written

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1 The practical effect of the suspension was to cause the girls to fail their entire sophomore year. It will be possible for them to graduate with their class, but they must complete three academic years in two by taking an increased course load during their final two years in school.

statement, which it described as a statement of facts found by it.[2] The students related their story to the Board and offered their apologies. The Board voted to uphold the suspension, and the hearing ended.

Thereafter, two of the students—Strickland and Crain— commenced an action in United States District Court under 42 U.S.C. §1983. They alleged that they had been deprived of the right to attend school without benefit of due process. They asked that they be reinstated, that the defendants be enjoined from imposing sanctions, and that the rule with respect to intoxicants be declared invalid and void. After an evidentiary hearing on a motion for a preliminary injunction, the District Court urged the appellees to reinstate the students, but refused to order the Board to take such action, apparently on the grounds that the students had not made an adequate showing of irreparable injury and had failed to convince the court that they were likely to prevail on the merits.

The students subsequently amended their complaint, adding a prayer for damages. The matter was then tried to a jury. The defendants moved for a directed verdict, apparently at the close of the plaintiffs' case. This motion was denied. After the jury failed to reach a verdict, the court declared a mistrial. The

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2 "*FACTS FOUND BY SCHOOL BOARD*

"1. That Virginia Crain, Peggy Strickland and Jo Wall are students of Mena High School and subject to the governing rules and policies of Mena High School.

"2. That on or about February 7, 1972 these three girls were charged with the responsibility of providing refreshments for a school function, being a gathering of students of the Home Economic class and some of their parents, on school premises, being the auditorium building of Mena High School, and being under the direction of Mrs. Curtis Powell.

"3. That the three girls in question traveled to Oklahoma, purchased a number of bottles of malt liquor, a beer type beverage, and later went onto school premises with the alcoholic beverage and put two or more of the bottles of the drink into the punch or liquid refreshment which was to be served to members of the class and parents."

court subsequently granted the defendants' motions for judgment in accordance with their motions for a directed verdict and denied the plaintiffs' motion for a new trial.[3]

The students contend on appeal that the trial court erred: in denying them equitable relief; in failing to declare the rule with respect to the possession or use of intoxicating beverages invalid; in erroneously instructing the jury with respect to good faith as a defense; and in refusing to grant the students a new trial.

The law with respect to the rights of students is still developing. We think it is clear, however, that the following general principles are reasonably well established. The responsibility for public education is primarily the concern of the states. The exercise of this responsibility, however, must be consistent with federal constitutional requirements.[4] School boards have the right to adopt reasonable rules and regulations governing the conduct of high school students[5] and regulations proscribing the possession or consumption of intoxicating beverages by students at school functions are reasonable. Students cannot, however, be given lengthy suspensions for violating valid rules without being accorded substantive and procedural due process. If they are given such a suspension without the benefit of due process, they may bring a §1983 action for declaratory and injunctive relief against the school district, the school board and those administrators involved in the decision.[6] They may also

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3 The opinion of the trial court is published at 348 F.Supp. 244 (W.D. Ark. 1972).

4 *Jones* v. *Snead*, 531 F.2d 1115 (8th Cir. 1970).

5 *Tate* v. *Board of Ed. of Jonesboro, Ark., Spec. Sch. Dist.*, 453 F.2d 975 (8th Cir. 1972); *Esteban* v. *Central Missouri State College*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

6 *Jones* v. *Snead, supra; Tate* v. *Board of Ed. of Jonesboro, Ark., Spec. Sch. Dist., supra; Farrell* v. *Joel*, 437 F.2d 160 (2nd Cir. 1971); *Esteban* v.

meeting and were given an opportunity to present evidence.[10] But we need not decide whether, in fact, the meeting did so because the students were denied substantive due process at both meetings.

To justify the suspension, it was necessary for the Board to establish that the students possessed or used an "intoxicating" beverage at a school-sponsored activity. No evidence was presented at either meeting to establish the alcoholic content of the liquid brought to the campus. Moreover, the Board made no finding that the liquid was intoxicating. The only evidence as to the nature of the drink was that supplied by the girls, and it is clear that they did not know whether the beverage was intoxicating or not. The District Court recognized this void in its March 7 findings of fact. It stated:

> "I have had grave questions throughout this trial as to whether this concoction from which these students got such a terrific charge was ever an intoxicating beverage. * * * [T]he term 'intoxicating beverage' as used in the manual is not defined but the term 'intoxicating liquid' is certainly well defined under the Arkansas laws and it provides that it must be a content in excess of 3.2 or 5 per cent by weight and I am afraid the School Board is or has made a mistake here but I do not see any constitutional thing within the jurisdiction of this Court that requires any intervention by the Court at this time on the temporary application. If it ever reaches the matter of proof on the intoxicating angle I don't think you will ever be able to prove that thing there—

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[10] See, *Pervis* v. *LaMarque Independent School District*, 466 F.2d 1054 (5th Cir. 1972). In that case, the Court ruled that where students were suspended without a hearing for three months, a subsequent hearing did not cure the initial constitutional deprivation. The Court, in discussing the dangers inherent in the contrary view, states at 1058:

> "* * * How, then, could they have been made whole? They would have lost some 3 months of education. This result cannot obtain. Procedural due process must, on the facts present in this case, be given prior to imposition of serious suspensions."

bring an action for damages against the individual members of the board and the administrators of the school system who participated in the decision.[7] Good faith is a defense in damage actions, but not in actions for equitable relief.[8] With these general principles in mind, we turn to the issues raised here.

We believe that the regulation which prohibits the possession or consumption of intoxicants by Mena High School students at school or at a school function is reasonable.[9]

We hold that the suspensions for the balance of the semester imposed by the Board were severe enough to require that due process be afforded the affected students. They resulted in the girls effectively losing nearly a full year's credits.

We think it clear that the students were denied procedural due process at the February 18 meeting of the Board. Their parents were not notified of the meeting, and were not given an opportunity to appear at it. We recognize that the March 2 meeting may have cured the procedural defects because it was held promptly after the suspension, and because the students and their parents were given notice of the time and place of the

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Central Missouri State College, supra; Wasson v. *Trowbridge*, 382 F.2d 807 (2nd Cir. 1967); *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). See also, "Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education," 45 F.R.D. 133, 147 (W.D. Mo. 1968).

7 *Gouge* v. *Joint School District No. 1*, 310 F.Supp. 984 (W.D. Wis. 1970).

8 *Gouge* v. *Joint School District No. 1, supra.* See, 2 T. Emerson, D. Haber & N. Dorsen, Political and Civil Rights in the United States (3rd ed. 1967).

9 Although the regulation seems to call for mandatory suspension for the balance of the semester and the "Administrative Policies" for the Mena Public Schools do not provide for a hearing in the event of expulsion or suspension, we need not discuss the appellants' challenge of the regulation on those grounds. The Board apparently did not view the regulation as restricting their actions, for they did hold a belated hearing and did consider imposing a less severe penalty.

> in spite of the fact that these little girls giggled around and got themselves kicked out of school on such a silly thing— I don't think you will ever be able to prove that that stuff is intoxicating."

For reasons not apparent from the record before us, the court failed to discuss this absence of evidence in its final opinion and made no finding that the School Board had determined that the beverage brought to the school by the girls was intoxicating. Under these circumstances, we have no alternative but to find that the students were denied substantive due process and that they were entitled to have their records cleared and to be reinstated. As reinstatement is no longer possible, the students are entitled to have their records cleared and to be relieved of any punishments that may be of a continuing nature.

Lest we be misunderstood, we make it clear that the School District can prohibit the use and possession of any *alcoholic beverages* if it desires, or it may continue its present policy and bar intoxicating beverages only.

We turn then to the question of whether the trial court properly directed a verdict against the students as to their claim for damages as against all defendants.

The directed verdict was appropriate as to the School District because under the doctrine of *Monroe* v. *Pape*, 365 U.S. 167 (1961), a school district is immune from damages in a §1983 action.[11]

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11 We note here that an exception to the *Monroe* rule has been developed in that line of cases following *Harkless* v. *Sweeney Independent School District*, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971). That Court held that claims for back pay by teachers are part of the equitable relief for reinstatement and not damages. See, *United States of America* v. *Cotton Plant School District No. 1, et al.*, Nos. 72-1583, 72-1615 (8th Cir. June 6, 1973); *Board of Ed. of Chidester Sch. Dist. No. 59, Ark.*, 448 F.2d 709 (8th Cir. 1971).

It was appropriate as to Superintendent Inlow and Principal Waller because there is no evidence in the record to support a claim against them. Neither had a vote in the suspension proceedings and neither recommended that the girls be suspended.

It was inappropriate as to the individual School Board members because the record shows clearly that the plaintiffs established that they had been suspended without regard to substantive due process and the defense of good faith was not established as a matter of law. Moreover, the court took an erroneous view of the law. It instructed the jury that the plaintiffs had to prove that the defendants acted with malice toward the plaintiffs. No such specific intent need be proved to recover compensatory damages. It need only be established that the defendants did not, in the light of all the circumstances, act in good faith. The test is an objective, rather than a subjective, one.[12] The appellants must accordingly be given a new trial on the issue of damages with respect to the defendant School Board members.

We remand to the District Court for action consistent with this opinion. An attorney's fee in the sum of $500.00 is awarded to counsel for the appellants. Costs will be taxed against the appellees.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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12 *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Gouge* v. *Joint School District No. 1, supra*. See generally, WASH. U. L. QTLY 666 (1971); Weddle, Damages Under §1983: The School Context. —— IND. L. J. 521 (————).

APPENDIX II

United States Court of Appeals
for the Eighth Circuit

No. 72-1774 September Term, 1973

Peggy Strickland, etc., et al.,
Appellants,
vs.
S. L. Inlow, et al.,
Appellees.

Appeal from the United States District Court for the Western District of Arkansas.

The Court having considered petition for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

September 27, 1973

APPENDIX III

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 72-1774

Peggy Strickland, etc., et al., Appellants,

vs.

S. L. Inlow, et al., Appellees.

On Petition for Rehearing.

Appeal from the United States District Court for the Western District of Arkansas.

Filed: October 18, 1973.

MEHAFFY, Chief Judge, joined by STEPHENSON and WEBSTER, Circuit Judges, dissenting from denial of the petition for rehearing en banc.

The appellees in this case have filed a petition pursuant to *Fed. R. App. P.* 40 for a rehearing with suggestion for a rehearing en banc. The Arkansas School Boards Association has joined as amicus curiae in support of the appellees' petition. After an examination of the panel's opinion in this case and of the above-mentioned petitions I voted to grant a rehearing en banc. Although a majority of the active judges of this court voted to deny appellees' petition, I feel compelled to respect-

fully dissent from the denial of the petition for rehearing en banc.

My principal disagreement with the panel's opinion involves its use of substantive due process as the basis for reversal. I fully recognize that a public high school student has a very strong interest in his or her education. I also recognize that the student's interest in public education enjoys very important procedural and substantive federal constitutional protection from certain types of unwarranted state action. I cannot agree, however, with the panel's conclusion that the due process clause of the fourteenth amendment empowers this or any other federal court to review every public school disciplinary action on the basis of sufficiency of the evidence. Instead, I am firmly convinced that the substantive reach of the due process clause on the public school campus is limited to the protection of specifically identifiable federal constitutional rights.

This is not a case where the school board has invaded federally protected areas of speech, association, religion, or equality of race or sex. Nor is this a case where the procedure accorded the students was inadequate, unreasonable, or unfair. Instead, as the panel itself concludes, this is a case where the school board had established a reasonable rule, the students had notice of the rule, the students by their own admission had violated the rule, and, after full procedural protection was afforded, the rule was enforced. Under such circumstances I fail to perceive any federal constitutional question in appellants' attack.

I am, of course, aware that "substantive due process" has in the past been used without regard to any specific constitutional safeguard to attack a wide variety of state action. *E.g.*, *Lochner* v. *New York*, 198 U.S. 45 (1905); *Coppage* v. *Kansas*, 236 U.S. 1 (1915). But I thought the federal judiciary had long since rejected such a free-wheeling use of "substantive due process" because it inevitably had led to an unwarranted in-

vasion of the duties and responsibilities of state and local governments. *E.g., Ferguson* v. *Skrupa,* 372 U.S. 726 (1963). None of the cases cited by the panel supports such an unfettered reading of the due process clause; instead, all of the cases involved attacks either on the procedure accorded or on an alleged invasion of some specifically protected right such as free speech. I fear that the panel's opinion now places every federal court, at least in this circuit, in the position of serving as a board of appeal for every disciplined public school student who feels that his punishment was too severe or that the school board's decision was not supported by substantial evidence. I feel that this function is one that is the sole responsibility of the state and local governments, which in this case have long provided an appropriate judicial remedy. *E.g., Douglas* v. *Campbell,* 89 Ark. 254, 116 S.W. 211 (1909).

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX IV

Supreme Court of the United States

No. A-606

S. L. Inlow, et al.,

Petitioners,

v.

Peggy Strickland, etc., et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 22, 1974.

S/ HARRY A. BLACKMUN
Associate Justice of the Supreme
Court of the United States

Dated this 17th day of December, 1973.

APPENDIX V

Peggy Strickland, a minor, by Mr. and Mrs. Virgil Justice, her Parents and Next Friends, and Virginia Crain, a minor, by Doris Crain, her Mother and Next Friend, Plaintiffs,

v.

S. L. Inlow et al., Defendants.

Civ. No. FS 72-C-11.

United States District Court,
W.D. Arkansas,
Fort Smith Division.

Sept. 29, 1972.

MEMORANDUM OPINION

Paul X Williams, District Judge.

The plaintiff, Peggy Strickland, is a minor and brought this action through and by her parents, Mr. and Mrs. Virgil Justice, as her next friends. The plaintiff, Virginia Crain, is a minor and brought this action by and through her mother, Doris Crain, as next friend.

The defendant, S. L. Inlow, was at all times pertinent herein the Superintendent of Schools at Mena, Arkansas and employed as such by the Board of Education of the defendant, Mena Special School District. The defendant, Duddy Waller, was at all times pertinent herein the Principal of the High School at Mena, Arkansas, employed as such by the Board of Education of Mena Special School District. All other personnel de-

fendants are members of the Board of Education for the Mena Special School District, and were serving at all times pertinent herein. This action is brought against each defendant in both his or her individual capacity and official capacity with the Mena Special School District. The defendant School District is the political sub-division and arm of the government of the State of Arkansas charged with the responsibility of conducting the public schools for Mena Special School District in Polk County, Arkansas.

All parties hereto are residents of Polk County, Arkansas except Mena Special School District and it is located in Polk County, Arkansas.

On and prior to February 18, 1972, plaintiffs were duly enrolled as students in the High School in Mena, Arkansas, both in their sophomore year, and were attending said school regularly and in good standing, making passing grades and neither having ever been subjected to any disciplinary procedure before February 18, 1972.

At some time prior to February 18, 1972 the defendants or their predecessors had promulgated as a part of the school policy a certain rule and regulation as follows:

"3. Suspension

* * * * * * *

b. Valid causes for suspension from school on first offense: Pupils found to be guilty of any of the following shall be suspended from school on the first offense for the balance of the semester and such suspension will be noted on the permanent record of the student along with reason for suspension.

* * * * * * *

4. The use of intoxicating beverage or possession of same at school or at a school sponsored activity."

On February 18, 1972 the plaintiffs were both expelled from the Mena Public Schools for one week by the defendant Duddy Waller on a charge of having violated the foregoing rule and on February 18, 1972, the defendant School Board expelled the plaintiffs for the balance of the semester on the same charge.

Following their expulsion by the School Board the plaintiffs, with their parents present, met with the defendants Inlow and Waller and were told of the action of the Board—that it was based on the foregoing rule—that the Board considered the rule mandatory and that they had no choice but to make the expulsion for the balance of the school term. The parents of the plaintiffs requested the defendants Inlow and Waller to call a special meeting of the Board but the defendants declined to do so. The plaintiffs then employed counsel and upon their attorney's request, the School Board held a special meeting on March 2, 1972 at which the plaintiffs, their parents and their attorney were present.

At the hearing the girls freely admitted they had added two 12 ounce bottles of a flavored malt liquor beverage called "Right Time" to one and a half gallons of punch at a school function held on February 7, 1972 for the purpose of "spiking the punch."

They expressed regret for the childish prank and asked that the School Board change its policy of suspension for a semester as punishment for the violation.

The School Board, after hearing all the offered evidence, voted not to change the school policy and to expel the young ladies for the remainder of the semester. It also made provision through its school counselor that the girls could follow a course of instruction including some correspondence course in English from the University of Arkansas that would enable the girls to graduate with their class if they did the required work.

The plaintiffs then amended their Complaint and alleged as follows:

"The actions of the defendants as specified in the Complaint heretofore filed in this cause, and each of them, has damaged each of these plaintiffs by depriving them, unlawfully, of their right to attend the public school at Mena, Arkansas, and by forcing them to pursue some substitute means of education at their expense and inconvenience; and further has caused and will continue to cause humiliation and embarrassment to the plaintiffs by reason of the stigma attached to the action of the defendants in assessing excessive punishment by way of expulsion of each of the plaintiffs for the balance of the term and for enforcement of the School Board policy under color of State Law requiring the making of a record of the unlawful punishment assessed against these plaintiffs, which record will continue to follow, harass, intimidate, abuse and embarrass the plaintiffs for the remainder of their lives. In addition, the plaintiffs have been and are being compelled to litigate with the defendants their right to attend the public schools of Mena, Arkansas, at great inconvenience and expense and will continue to do so until this litigation is terminated.

The plaintiffs further allege that the actions of the defendants have been taken with malice toward these plaintiffs and without any bases therefor and with such wanton disregard of the rights of these plaintiffs as to subject themselves personally and individually, and as to subject the school district which they represent, to punitive damages in this case in the amount of $5,000.00 for each defendant herein.

Wherefore, the plaintiffs pray judgment against the defendants and each of them, in their personal and individual capacities respectively, and against the defendant school district, jointly and severally, in the amount of $25,000.00 as compensatory damages for each plaintiff herein; and reasonable attorney's

fees, and further pray judgment against each defendant, personally and individually, and against the defendant school district, for punitive damages in the amount of $5,000.00 against each such defendant. The plaintiffs further pray judgment for all of their costs herein laid out and expended."

The case was tried to a jury. At the conclusion of all of the evidence each defendant made a motion for a directed verdict in his favor as to each plaintiff.

The Court overruled the motions and submitted the case to the jury. The jury was unable to reach a verdict and a mistrial was declared.

Each defendant, pursuant to Rule 50(b) of Federal Rules of Civil Procedure, within 10 days after the jury was discharged, moved for judgment in accordance with his motion for directed verdict—and each of those motions is now under consideration by the Court.

There can be no question as to the propriety of the procedure adopted by each of the defendants. In addition to following the letter of the law as set forth in Rule 50(b) the exact procedure was approved by the Court of Appeals for the 8th Circuit in the case of Watkins v. Oaklawn, 183 F.2d 440 in affirming (D.C.) 86 F.Supp. 1006, a case decided by Hon. John E. Miller in 1949.

The mechanism that makes Rule 50(b) constitutionally valid is the provision that "whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion," and it will be deemed to have reserved decision even if it has denied the motion. Lowden v. Denton (8th Cir. 1940), 110 F.2d 274, cert. denied 310 U.S. 652, 60 S.Ct. 1100, 84 L.Ed. 1417.

It has been held that the Court may not order a new trial until the parties who had moved for a directed verdict have the opportunity this 10 day period provides them in which to move for judgment. Grace Lines, Inc. v. Motley (2nd Cir. 1971), 439 F.2d 1028.

Whether the evidence is sufficient to create an issue of fact for the jury is solely a question of law to be determined by the Court.

In the 8th Circuit a scintilla of evidence is not enough. The question is not whether there is literally no evidence but whether there is evidence upon which the jury could properly find a verdict for that party.

It is not for the Court to weigh the evidence or pass on the credibility of witnesses; and the Court must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence.

Following and observing these guidelines we come to a consideration of the evidence in the cases at bar.

The evidence clearly shows that the young ladies were expelled from school pursuant to declared school policy which had been in force for several years after they frankly confessed to "spiking the punch" with two bottles of "Right Time", a malt liquor.

It is fair to say that both plaintiffs and their attorney concede that they put the malt liquor in the punch intentionally.

The plaintiffs themselves concede that they violated the school policy, but that suspension for the remainder of the semester was too severe a penalty.

The attorney for the plaintiffs ably argued and urged that in spite of what his clients said, there was actually no violation

of the policy because the alcoholic content of "Right Time" is so low that it does not and did not constitute a violation of the school policy.

Irregardless of the soundness of such a contention it is Arkansas law that the directors of any school district may suspend any pupil for conduct that would tend to impair the discipline of the school. No school director is liable in damages for any decision or action made or taken in good faith.

In the cases at bar the Court instructed the jury that in order to find for any plaintiff against any defendant, the jury must find that he, she or it acted with malice toward the plaintiff.

The Court further stated that malice means ill will against a person—a wrongful act done intentionally without just cause or excuse. (Page 18 of Court's Instruction.) The Court also declared:

(Page 22)

You are instructed that the Mena School Board had the right to promulgate as a part of its statement of policy the declaration concerning intoxicants; and the matter of the reasonableness or unreasonableness of this declared policy is not properly in question in this case.

Furthermore, the School Board members had the right to enforce the same.

You are instructed that the teachers and school administrators had the right to enforce the school policy.

(Page 23)

In making penalty decisions concerning an alleged infraction of declared school policy such as the policy against bringing intoxicants on school premises, no teacher, administrator, school

board member or school district will be liable for any action taken or decision made if his, her or its action or decision was in good faith; and this non-liability exists even if the action or decision actually taken or made was in truth incorrect; so, if you find that any defendant acted in good faith as regards the matters at issue in this case, then your verdict will be in favor of that defendant.

(Page 25)

If you find that in fact the malt liquor "Right Time" is not and was not an intoxicant as that term is used in the declaration of Mena School policy; but you find that the plaintiffs and the school authorities in good faith considered it to be, then you are instructed that the good faith of a particular defendant in discharge of duties as a school board member or school administrator is a full and complete defense in this case as to that particular defendant.

The intelligence and quality of judgment of each of the defendants is not in issue in these cases, and

It is a well known fact that hindsight is often better than foresight, so

If you find from a preponderance of the evidence that an incorrect decision was made by any defendant in this case, the fact that the decision is incorrect or that a more sensible or more intelligent decision would have been desirable is not completely controlling, and

If you find that the particular defendant was acting in good faith, then the good faith of the defendant is a total defense in this case.

Plaintiffs have made such complaint that the Court in its instructions points out that "malice" must be proved before a

defendant in this case can be held liable in damages. Each plaintiff finds equal fault with the Court's instructions that "good faith" is a complete defense.

We point out that the real question at issue here is whether or not responsibility in damages can be assessed against either a school district, a school administrative officer or a school board member in a very narrow field and that is the field of his, her or its exercise of discretion in expelling a pupil for violation of a prescribed school policy already found acceptable by rule and order of this Court.

By its instructions the Court has said that no defendant is liable for judgment made or policies enforced in the usual and orderly conduct of school affairs if the particular defendant has decided, judged and acted in good faith, i. e., without malice toward a plaintiff.

A great deal of plaintiffs' brief has been devoted to a scholarly discussion concerning the protection of a civil right to attend school and the rules and remedies should that civil right be violated.

That is not and never has been an issue in this case.

Here, each plaintiff was enrolled in school.

Here, the school had a policy requiring suspension from attendance when a child violated the policy concerning intoxicants. A full scale hearing was conducted concerning the question of whether or not the policy adopted by the Mena school was a proper exercise of authority by that school board. This Court held that the policy was constitutionally permissible if applied equally to all pupils, which is to say, "if it is constitutionally and fairly enforced."

In the findings of the Court on March 7, 1972 there appears the following language:

"This is an application for a temporary restraining order under Rule 65 of the Federal Rules of Civil Procedure under which a temporary restraining order could be issued if there is immediate danger of, as we say, an irreparable injury or immediate injury, loss or damage, which would happen before a trial could be had on its merits. That puts the burden on Mr. Core and his clients to show such a situation. At this time we are dealing with a case where two young ladies are required to attend school and the school has passed regulations which the school has the burden of showing it had a right to promulgate. It will be the finding of this Court that **the School Board not only had the right but did promulgate a Code of Regulations,** if you want to call it that, or a manual that provided that pupils found to be guilty of any of the following shall be suspended from school on the first offense for the balance of the semester and such suspension will be noted on the permanent record of the student along with reason for suspension. Item Four under that listed the use of intoxicating beverages or possession of same at school or at a school-sponsored activity. The Court finds that **the school had the right to adopt that rule; they did adopt that rule, and the School Board had reasonable grounds to believe that that rule had been violated at the time it took its initial action in this case.** Consequently the temporary application—the application for temporary restraining order will be overruled, denied." (Emphasis added.)

We point out that the right of a school district to make reasonable rules has been plainly declared in the 8th Circuit.

In the case of Esteban v. Central Missouri State College (8th Cir. 1969) 415 F.2d 1077, Judge Blackmun (now Justice Blackmun), speaking for a divided Court, but announcing the majority opinion stated (Beginning on p. 1088):

"We agree with those courts which have held that a school has inherent authority to maintain order and to discipline students. State ex rel. Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822, 827 (1942) cert. denied, 319 U.S. 748, 63 S.Ct. 1158, 87 L.Ed. 1703; Jones v. State Bd. of Educ., 279 F.Supp. 190, 202 (M.D.Tenn.1968), aff'd 407 F.2d 834 (6 Cir. 1969); Buttny v. Smiley, 281 F.Supp. 280, 285, 286 (D.Colo.1968); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 757 (W.D.La.1968); Barker v. Hardway, supra (D.C.), 283 F. Supp. 228 at 235. We further agree that a school has latitude and discretion in its formulation of rules and regulations and of general standards of conduct. Goldberg v. Regents of University of Cal., 248 Cal.App.2d 867, 57 Cal.Rptr. 463, 472 (Ct.App. 1967); Dickey v. Alabama State Bd. of Educ., 273 F.Supp. p. 613, 618 (M.D.Ala.1967); Jones v. State Bd. of Educ., supra; Buttny v. Smiley, supra; Cornette v. Aldridge, 48 S.W.2d 935, 941 (Tex.Civ.App. 1966)."

and continuing on pages 1089-1090:

"Let there be no misunderstanding as to our precise holding. We do not hold that any college regulation, however loosely framed, is necessarily valid. We do not hold that a school has the authority to require a student to discard any constitutional right when he matriculates. We do hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct; that, as to these, flexibility and elbow room are to be preferred over specificity; that procedural due process must be afforded (as Judge Hunter by his first opinion here specifically required) by way of adequate notice, definite charge,

and a hearing with opportunity to present one's own side of the case and with all necessary protective measures; that school regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure; and that the court should interfere only where there is a clear case of constitutional infringement.

After all, the test, we feel, is that of reasonableness. Dickey v. Alabama State Bd. of Educ., supra, 273 F.Supp. at 618. On that standard we perceive here no denial of constitutional rights of Esteban or of Roberds. If these two plaintiffs are really serious in what is said to be their protestations of desire to complete their college education, we naturally assume that they will apply for readmission. We are mildly surprised that they have not done this as yet. We also assume, of course, that the College will view their applications, if and when they are ever submitted, with the respect and deferences to which they are entitled. Affirmed."

Here, each plaintiff admitted a violation of the policy.

The able attorney for the plaintiffs contended that there was no violation because "Right Time" was of low alcoholic content; but the expelled students and their parents did not advance such a theory. They merely contended that the penalty was too severe when applied to their child.

The Court, in its instructions pointed out that no defendant could be liable in damages except if in the expelling process, a defendant's action, was the result of "malice" toward the plaintiffs or either of them.

This freedom in the exercise of judgment is as necessary in the administration of a public school's discipline as the freedom of the judiciary is in matters that require exercise of independent judgment in courts of law. So long as the exercise of inde-

pendent judgment is free of "malice" and/or is an action in good faith, there can be no action for damages.

Perhaps we should say that while each plaintiff had a right to enroll in the Mena School, neither plaintiff had a right to escape being suspended from school after a demonstrated infraction of the school rules. Each plaintiff had a civil right to enroll. Neither had a civil right to violate the rules by "spiking the punch" and each plaintiff having become an offender was subject to the school discipline of being suspended.

Damages against a school district, a school administrator or a school board member should never be permitted unless they result from a malicious motive and action.

School personnel engaged in operating a school system are, by the very nature of their work, engaged in guiding the conduct of pupils entrusted to their care. The representative system of our country has been utilized to select the school personnel for that very purpose. To discharge their required duties they must make decisions and judgments. Only if they act with malice can they be held to answer in damages. When a dissatisfied patron finds fault he must meet that high standard of proof before he can recover damages.

In the case of Freeman v. Gould Special School District of Lincoln County, Arkansas, 405 F.2d 1153 at p. 1161 (1969), cert. denied 396 U.S. 843, 90 S.Ct. 61, 24 L.Ed.2d 93, Judge Gibson used the following language:

> "We do not think it within the province of the federal court to pass upon and decide the merits of all of the internal operative decisions of a school district. However, even if we were to pass upon the merits of this issue, we do not think that we could say that the Board was capricious or arbitrary in its attempt to resolve this internal dispute between the teachers and the principal of the school.

There must be some degree of harmonious cooperation in school administration to insure an efficient use of public funds and a reasonably satisfactory school program. School boards are representatives of the people, and should have wide latitude and discretion in the operation of the school district, including employment and rehiring practices. Local autonomy must be maintained to allow continued democratic control of education as a primary state function, subject only to clearly enunciated legal and constitutional restrictions."

At common law a qualified immunity was given to school authorities in matters in which the authorities are authorized to act and in which they have the right of decision.

47 Am.Jur. Schools, Section 187, p. 433 is as follows:

"Remedies for Wrongful Exclusion—Although a teacher who rightfully expels or suspends a pupil cannot be compelled to reinstate him, where school authorities maliciously, arbitrarily, or without reasonable cause expel or suspend a pupil, an injury is done which the law will redress by mandamus to compel admission or reinstatement in the school, by a mandatory injunction, or by an action for damages. Express statutory authority to suspend or expel does not alter the relative rights and duties of school authorities and pupils. Such statutes merely expressly give to the authorities the power already inherent in them and leave it subject to the same limitations.

The gist of an action for wrongful expulsion or suspension is malice; therefore, there can be no recovery where the expulsion or suspension is the result of an error by judgment by the school authorities, where they act without malice, in good faith, and in the line of what they honestly believe to be their duty. And even where a school board has acted with malice, authority exists for the view

that their actions are to be likened to those of judicial officers, who are immune from liability when acting within their jurisdiction. Unless he has sustained some direct pecuniary injury thereby it is generally held that a parent has no right to sue for damages for the unlawful expulsion or suspension of his child, since it is the child, rather than the parent, on whom the deprivation falls."

. . . . . .

The rule of qualified immunity of school authorities is stated in an annotation in 42 A.L.R. 763 as follows:

> "The authorities of a school are not personally liable to a pupil for expelling or suspending him from school, when they act without malice, and in good faith, and in the line of what they honestly believe to be their duty."

In Arkansas the immunity is a qualified one by decision law and an absolute immunity by statute. In Douglass v. Campbell, 89 Ark. 254, 116 S.W. 211 (1909), the Court stated the qualified immunity of teachers and school board in the suspension and expulsion of pupils, as follows:

> "It will be presumed that the teacher and the board have the best interests of the school at heart, and that they have acted in good faith in exercising the authority with which the law has clothed them. The burden is upon him who calls in question their conduct to show that they have not been actuated by proper motives. But if the teacher and board should through malice, arbitrarily and without reason, suspend a pupil from school, the pupil would have his remedy, as we have before mentioned, and the parent also would have his remedy if he has sustained any pecuniary injury by reason of such illegal suspension."

Arkansas, by statute announced the State policy as follows:

Ark.Stat. 80-1812. Directors Exempt from Liability.—

"It is hereby declared that the directors of all school districts and special school districts in this state in the discharge of their duties as such directors act in a necessary governmental function. Therefore, no action for personal injuries or damage to property arising out of the acts, conduct, or omissions of such directors in their official capacities shall hereafter be brought or maintained in this state against such directors personally."

But it is not the Arkansas statute alone which confers immunity because immunity was created by the common law and case law as well as by statutes. The Federal Courts have balanced the compelling interest of the various affected parties in school civil rights cases and have adopted the qualified immunity doctrine and have applied it to school civil rights cases.

Gouge v. Joint School District No. 1, 310 F.Supp. 984 (D.C. Wis.), involved an action by terminated teachers against members of the board of the school district for compensatory and punitive damage. This was an action under the Civil Rights Act. In his opinion Judge Doyle stated:

"Defendants contend that all of them are entitled to dismissal of the entire action on the basis of common law immunity.

(3) This contention is clearly without merit with respect to the equitable relief sought here, namely, reinstatement. The purpose of common law immunity enjoyed by the judiciary and legislature, here sought to be extended to school boards and administrators, is to preserve the integrity and independence of those bodies, and to insure that judges and legislatures will act on their free, unbiased convictions, uninfluenced by any apprehensions of consequences. Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951); Bauers v. Heisel, 361 F.2d

581 (3d Cir. 1966), cert. den. 386 U.S. 1021, 87 S.Ct. 1367, 18 L.Ed.2d 457; Kenney v. Fox, 232 F.2d 288 (6th Cir. 1956), cert. den. Kenney v. Killian, 352 U.S. 855, 77 S.Ct. 84, 1 L.Ed.2d 66.

Such considerations do not support granting immunity to school boards and administrators against actions seeking the type of equitable relief reflected in an order of reinstatement.

With respect to common law immunity from the plaintiffs' claims for damages, the situation is different. In Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), the Court held, in an action for damages only, that a policeman was excused from liability under 42 U.S.C. § 1983 when acting in good faith under a statute which he reasonably believed valid, but which was later held unconstitutional. In McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968), the Seventh Circuit applied the Pierson doctrine to an alleged factual situation somewhat similar to the present cases. In McLaughlin, two probationary teachers brought an action for damages only, under 42 U.S.C. § 1983, against the Superintendent of Cook County, Illinois, School District No. 149 and the members of the Board of Education of that District. The complaint alleged that plaintiff Steele had not been rehired and plaintiff McLaughlin had been dismissed because of their association with a union. On a motion to dismiss, in deciding the defendants' contention that they enjoyed immunity under both Illinois statute and the common law, the court stated:

"Legislators and judges have broad immunity under Section 1983 because in enacting that statute Congress did not intend to overturn their pre-existing defense. Tenney v. Brandhove, 341 U.S. 367, 376, 71 S.Ct. 783, 95 L.Ed. 1019; Pierson v. Ray, 386 U.S. 547, 554-555,

87 S.Ct. 1213, 18 L.Ed.2d 288. However, other officials, such as present defendants, retain only a qualified immunity, dependent on good faith action. Pierson v. Ray, supra, at p. 555, 87 S.Ct. 1213; . . .."

In Schreiber v. Joint School District No. 1, 335 F. Supp. 745 (D.C. Wis.), the Court stated:

"Nor is the doctrine of common law immunity an absolute bar to the granting of legal relief but rather merely a partial bar, dependent on good faith action. Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968)."

In McDonough v. Kelly et al., 329 F.Supp. 144 (D.C. N.H. 1971), in denying the claim for damages the Court applied the good faith doctrine in these words:

"There are two obstacles to the recovery of damages by the plaintiff both of his own making. The first obstacle is procedural. The plaintiff has chosen to sue the members of the School Board individually. No suit has been brought against the School District or the City of Manchester. While the very procedure of Dr. Lianos considering the plaintiff's case and voting on it without attending the hearing is shocking to one trained in the law, it does not constitute such bad faith as to render him, and the other School Board members individually, liable in damages. In fact, it must be found that even though the dismissal was constitutionally impermissible and violative of due process, it was done in good faith. See Gouge v. Joint School District, 310 F.Supp. 984, 990 (W.D. Wisc. 1970). Further, it would be unfair to make those members of the Board who voted against dismissing the plaintiff respond in damages." . . .

And in Barker v. Hardway, 283 F. Supp. 228 (D.C.West. Va. 1968) the Court stated:

> "And it may be noted in passing that the law indulges the presumption that school authorities act reasonably and fairly and in good faith in exercising the authority with which it clothes them, and casts the burden on him who calls their conduct into question to show that they have not been actuated by proper motives. 47 Am. Jur.2d (Schools) Sec. 188 p. 435."

This case involves the qualified immunity for school authorities acting within the scope of their authority and in the performance of their official duties.

The Court has carefully reviewed the entire evidence in the case and finds as a matter of law no evidence from which any malice toward a plaintiff can be found or inferred. In fact no witness ever attempted to say that any defendant acted maliciously.

The close question, if there is one at all, is whether or not the school policy, as adopted and maintained, plus the enforcement thereof, created a situation from which malice could be inferred.

The Court instructed that the Board had the right to promulgate the policy concerning intoxicants and the evidence disclosed no unconstitutional enforcement of the rule, hence the combination of circumstances could not and did not justify an inference of malice.

The plaintiffs attempted to attack the good faith of the various defendants on the ground that the policy itself provided too severe a penalty for a childish prank; but in no respect was the good faith of the defendants more clearly displayed than when the President of the school board pointed out that it was the "principle" that the board was enforcing.

Furthermore, the Court instructed at page 25 of its instructions as heretofore shown that the quality of the judgment and

the intelligence of each defendant is not and was not at issue in this case. The action of a defendant would have to be a wrongful act done intentionally without just cause, and even then the good faith of a defendant is a complete defense.

Consequently, the fact that the school policy may be severe cannot be made the basis of an action unless malice is shown.

Actually, if the school patrons of Mena wanted different school directors they had and have the election process available to them—and they should always exercise their franchise with prudence because the judgment of a director is not open to question unless malice is shown.

Perhaps specific comment should be directed to the cases of the two school administrators who had no voice in making the school policy, but by virtue of their positions were required to enforce it.

And some reference should be made to the fact that a school district is by its nature incapable of malice.

But since the Court finds no evidence of malice on the part of any defendant and no circumstances or set of circumstances from which malice of any defendant can be inferred, the Court merely notes that the school administrators and the school district itself had more defenses than the other defendants, but that a verdict should be directed in favor of each and all of the defendants.

The Clerk will prepare and enter a judgment in accordance with the motion of each defendant for a directed verdict as to the claims of each plaintiff and the costs will be adjudged against the plaintiffs.